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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD.
AND
MONTEREY-DEL MONTE DUNES CORP.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The *amici* have received the parties' written consent to submit this brief.[1] Letters of consent have been filed with the Clerk of this Court.

The National Association of Home Builders ("NAHB") represents over 190,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical*

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[1] Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997).

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly-owned subsidiary of the Building Industry Association of Southern California, whose 1,650 members include a significant number of residential developers and associate businesses accounting for 70% of all annual new home construction in Southern California. The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." It appeared before this Court as an *amicus curiae* in *Suitum v. Tahoe Regional Planning Agency*, *supra*.

The *amici* are here to present constitutional, legal and policy arguments on why the decision of the Court of Appeals squares with this Court's precedents regarding the application of the Just Compensation, or Takings, Clause to land use regulation that goes "too far." Property owning citizens, such as those represented

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[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

by the *amici*, must have available the right, a meaningful right, to go before judge and jury to seek just compensation for regulatory takings. If the circumstances of this development case are found not to amount to an unconstitutional taking, then members of the *amici* who face similar deliberate abuses of the land use system have little protection, in the real world, under the Constitution's Bill of Rights.

SUMMARY OF ARGUMENT

Regarding Question 2 (on "reasonableness"), the City of Monterey would expand the normal deference accorded municipal land use actions to a virtual bar on any meaningful judicial inquiry into those actions where a citizen is *singled out for particularized treatment* and can make out a cognizable claim of a violation of the Fifth Amendment's Takings Clause. Why? Why should this one constitutional right be treated differently from the others? Why should the defending government, rather than the impartial fact finder, make the final decision on the reasonableness of that government's actions when a citizen's constitutional right is at stake in court? Because, as the city candidly contends in its Brief, the Constitution should play a "limited role" in local land use decisions. To the city's way of thinking, its unilateral assertion of the "reasonableness" of its land use actions would serve as a pretext to defeat almost automatically any claim of an unconstitutional taking. But such an idea is contrary to this Court's precedents as well as to fundamental fairness. It is already exceedingly difficult, under ripeness doctrines, to get a takings claim

into court and, if to trial, to win such a claim. The argument pressed here by the city and its *amici* would make it well nigh impossible.

Regarding Question 3 (on *Dolan*), the Court of Appeals properly applied this Court's regulatory taking tests to the facts before it. The lower court did not misapply the *Dolan* "rough proportionality" standard because, as it held, the city never got past the threshold *Nollan* "substantial advancement" test. Indeed, the court's main discussion of *Dolan* concerned no live issue in the case; the court was merely bending over backwards in deference to the city in order to reinforce the meritlessness of the city's post-trial motion for a judgment notwithstanding the verdict. The city's attempt now to distinguish, on a constitutional level, development "exactions" from "denials" creates a distinction without a difference in the real world of land development application processing because *exactions and denials are used interchangeably* to leverage the police power to sometimes unconstitutional effect. Here, as proven at trial, conditions on use (exactions) and denials were applied over a period of years by Monterey for shifting and inconsistent reasons, which had the effect of securing private land as *de facto* public open space. After all, as the record shows in this case, a denial was simply an exaction *in extremis*.

Injury is done to the Constitution's great themes -- of separating governmental powers, of protecting individual rights, of insuring federalism -- by the arguments of the city and its *amici*. Here, if the local,

state and federal governments have it their way, an individual right would take a back seat to the convenient prerogatives of the majority, whether the as-applied police power action is local, state or federal, and neither a state nor federal court could realistically intercede to do what is just under the Constitution's Takings Clause. The Court of Appeals below did not abuse the Constitution nor this Court's decisions nor common sense.

ARGUMENT

I. IF NEITHER JUDGE NOR JURY CAN WEIGH THE EVIDENCE OF AN AGENCY'S LAND USE DECISION WHERE A PROPERTY OWNER CLAIMS A TAKING, THEN THIS COURT'S TAKINGS CLAUSE CASE LAW IS NUGATORY.

The courts below, after exhaustive fact finding and application of the law, found a regulatory taking of the owner's land by the city. The city now asks this Court to ignore those findings and to go beyond the normal deference accorded governmental actions affecting land use. The city is asking this Court to rule that where the Fifth Amendment's Takings Clause is at issue, no court can look into the asserted "reasonableness" of the city's action, irregardless, apparently, of that action's effect on a citizen's Fifth Amendment rights and the notion that the Just Compensation Clause is "an attempt to limit arbitrary sacrifice of the few to the many." Laurence H. Tribe,

American Constitutional Law § 9-6, at 605 (2d ed. 1988).

Under the city's reasoning, where a regulatory taking claim is made, the Constitution would offer only token protection to a citizen because the trier of facts could not weigh the evidence in a courtroom once the defending agency claims it acted reasonably. But what agency or city does not make such a defense in every such case?

As will be shown, Monterey's argument is directly contrary to this Court's takings jurisprudence. It would move the law from constitutional deference to abdication in this one arena of the Bill of Rights.

Additionally, the Court of Appeals' discussion of the "reasonableness" standard is in the context of the "reasonable relationship" test used by many state courts and referred to in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1429 (9th Cir. 1996) (*Del Monte Dunes II*). The Court of Appeals said nothing extraordinary, and the city overreaches by arguing otherwise.

Over the decades, this Court has been clear that when it comes to determining a land use taking, the "particular circumstances" of each case must be analyzed because these are "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (tower denied over an historic train terminal). *See Kaiser Aetna v. United States*, 444 U.S.

164, 175 (1979) (navigational servitude on a marina-related subdivision); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649-50 (1981) (Brennan, J., dissenting) (challenge to rezoning and adoption of open space plan); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (cable television facilities attached to apartment building); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986) (residential subdivision denied); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 474, 495 (1987) (challenge to coal subsidence statute); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (challenge to land consolidation statute); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (residential development denied).

Some of the above cases involved as-applied challenges, others were facial; some involved regulatory takings, others were physical; some involved development denials, others conditions on development; some involved 42 U.S.C. § 1983, others did not; some were from state courts, others federal. But they *all* concerned the Takings Clause and *not one* established a rule of governmental insulation from judicial scrutiny as pressed by the city here. Rather, as explained by this Court in the rent control case of *Yee v. City of Escondido*, a takings allegation "necessarily entails complex factual assessments of the purposes and economic effects of government actions." 503 U.S. 519, 523 (1992). *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("the [taking] question depends on the particular facts . . . ."); *Berman v. Parker*, 348 U.S.

26, 32 (1954) ("each [takings] case must turn on its own facts.").

This Court's consistent emphasis on a case-by-case factual assessment in the takings context (based on rules discussed in Argument II below) stems from Justice Holmes' admonition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415. As Professor Rose has observed, real property is a uniquely vulnerable regulatory target. "Land is the perfect object for confiscatory regulation, because the owner cannot pick it up and take it away ...." Carol M. Rose, *Takings, Federalism, Norms*, 105 Yale L.J. 1121, 1126 (1996) (book review). Indeed, in reviewing Professor Fischel's comprehensive book on takings, she (as did he) notes that the citizen most apt to be treated unfairly and to lose its property to the majority is the citizen that owns land that is undeveloped and is subject to local regulatory power. *Id.*; William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 105, 139, 204, 271 (1995). A citizen, in other words, precisely situated like Del Monte Dunes at Monterey, Ltd.

It is this "singling out" phenomenon that the City of Monterey (and its *amici*) wishes to ignore in its argument for *de facto* immunity from judicial scrutiny of its land use regulatory actions in this case. As recounted by the Court of Appeals in its first decision in this case, the land owners made five separate applications over as many years to use its property, all in conformance with

the city's general plan and zoning ordinance, only to be denied each use even though, by the fifth denial, the "city council did not base its denial upon failure to meet any of the specific numbered conditions." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1505 (9th Cir. 1990) (*Del Monte Dunes I*). Instead, "the city council abruptly changed course and rejected the [fifth] plan, giving only broad conclusory reasons." *Id.* at 1508. These deliberate, multi-year actions, based on no "substantial advancement" of a legitimate state interest, assured that the subject private property would remain "useless." Thereafter, the State of California purchased the land for public open space.

Whether government has acquisition on its mind or not, this Court has stated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Professor McUsic observes that *Armstrong's* principle condemning the "singling out" phenomenon carries straight through this Court's regulatory taking cases to *Dolan*. Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problems of Takings*, 92 Nw. U.L. Rev. 591, 642, 646 (1998). In a non-doctrinaire explanation of takings law, including the recent *Lucas* and *Dolan* decisions, Professor McUsic relates that these cases' "[land use] regulations violate the Constitution not for the now discredited [*Lochner*

era] reason that they single out a particular class for economic harm, but because they single out individuals within a particular class for economic harm." *Id.* at 652. And nowhere is a U.S. citizen more at risk of losing his or her Fifth Amendment property rights, based on a broad consensus of land use commentators as well as review of lower court decisions, than in California. William A. Fischel at 226-31; Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 113-14 (1993).

It should be the impartial fact finder, not the defending government, that decides the "reasonableness" of that government's actions when a citizen's constitutional right is at stake in court. The city's reasonableness argument is particularly mischievous given the extraordinary barriers already facing any citizen trying to get a takings claim before a court, federal or state, on the merits. First, "[t]he lower federal courts have vigorously applied the Supreme Court's ripeness doctrines to refuse jurisdiction in as-applied taking cases." Daniel R. Mandelker, *Land Use Law* § 2.26, at 44 (4th ed. 1997). *See Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, supra* (1986). As the Ninth Circuit itself has recognized, "ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land use decisions." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

In a survey of all regulatory taking cases involving as applied challenges to land use actions, decided in the lower federal courts between 1990 and 1997, it was found that 81% of the takings claims never reached the merits in the district courts. For those claimants who continued through the courts of appeals, more than half saw their takings claims deemed unripe. *Private Property Rights Implementation Act: Hearings on H.R. 1534 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 1-4 (1997) (statement of John J. Delaney, Esq., retained by NAHB). *See also* Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91 (1994).

Indeed, counsel for a well-known firm that generally represents local governments in land use matters agrees that the ripeness doctrine, in state as well as federal court, is "the municipality's best friend." Michael K. Whitman, *The Ripeness Doctrine in the Land Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 Urb. Law. 13, 14 (1997). The Court need only reflect on the ripeness arguments made last term in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), to appreciate the lengths to which local, state and federal governments will go to keep a land use litigant out of court.

Second, if a property owner can somehow overcome the ripeness doctrine (as in *Del Monte Dunes*

I, with five development applications), he or she then usually encounters the absention doctrine. And while "the Supreme Court has frequently stated that abstention is the exception rather than the rule, the federal courts often abstain in land use cases." Daniel R. Mandelker, § 8.38, at 376.

Finally, assuming a citizen makes it before a judge and jury in state or federal court, there are "few cases" where "courts have awarded damages in § 1983 land use cases," and "most state courts do not award compensation in taking cases." Daniel R. Mandelker, Jules B. Gerard, and Thomas E. Sullivan, *Federal Land Use Law* § 1.05[6], at 1-20 (1986, rev. 1998). Given this Court's rulings in *Agins* (1980), *Keystone* (1987) and *Yee* (1992), a facial takings challenge is extremely hard to sustain (to bring one is to face an "uphill battle," *Keystone*, 480 U.S. at 495). Yet the inevitable implication of Monterey's argument on "reasonableness" would be to make an as-applied challenge equally onerous, if not virtually impossible. The courthouse door, federal and state, would be effectively closed to citizens with land use takings claims.

Three prominent law and planning professors/ practitioners (one of whom is currently president of the American Planning Association), in a major essay, admit that the current system of presuming the constitutionality of municipal land use regulation has gone too far because the presumption has led to abuses of individual rights in the United States. Ann Louise Strong, Daniel R. Mandelker, and Eric Damian Kelly, *Property Rights and*

Takings, 62 J. Am. Plan. Ass'n 5 (1996). While the City of Monterey argues to this Court that it should tighten even further the traditional judicial deference accorded a government's land use decision, and that this tightening should be cast as a constitutional rule, Professors Strong, Mandelker and Kelly argue precisely the opposite -- that, if anything is changed, the constitutional presumption should be *shifted* where a citizen makes out a good case of a regulatory taking, whether it involves an exaction or outright denial of use.

> Courts have shifted the presumption to be against regulation in cases of exclusionary zoning; of arbitrary downzoning; and of regulations discriminating against vulnerable uses, such as group homes and unrelated families. This is only a partial list. Some of these cases are totally unrelated to takings claims arising out of economic impact on property, but they can raise legitimacy of purpose questions that are important in takings litigation. Courts should continue to shift the presumption against land use regulations in appropriate cases . . . . One logical area in which to shift the presumption is in "exactions" cases . . . .

Id. at 12.

* * * *

What has brought the [taking] issue to

the forefront is the frustration of many individual citizens and property owners with the complexity of a regulatory system that often involves multiple entities of government and multiple sets of regulation by a particular entity. In the absence of alternative uses or of administrative relief, landowners have, over the last two decades, begun to seek monetary relief for their perceived wrongs . . . .

In those cases where the system is unfair -- where the rules change in sudden or surprising ways, where a particular landowner is arbitrarily required by regulation to bear a disproportionate share of the burden of implementing public policy, where a landowner is in fact left with no economically viable use of her or his land -- the system offers too few alternatives . . . .

Id at 15.

In *Keystone*, a regulatory taking case brought as a facial challenge under 42 U.S.C. § 1983 in federal court,[4] this Court stated that:

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[4] Given the varied challenges by Monterey's *amici* to this Court's regulatory takings jurisprudence, including the assertion by local and state governments that they should be effectively exempt from judicial scrutiny in the land use takings area, it is worth recalling that § 1983 was enacted to protect citizens from

> *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute . . . . In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted, and have determined [a different outcome].

480 U.S. at 487 n.16.

Lucas drove the *Keystone* judicial inquiry point home. In an as-applied takings case, giving complete deference to legislative findings is misplaced and unfair because it ignores how an individual citizen's rights are treated by a specific governmental action; the Fifth Amendment requires a "total taking inquiry" into a case's circumstances. 505 U.S. at 1030. "South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public

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violations of their constitutional rights under color of state law, including, *inter alia*, the specific problem of takings without just compensation. *Monell v. Department of Social Services*, 436 U.S. 658, 685-87 & n.45 (1978).

interest . . . ." *Id.* at 1031. Of course, as found below in this case, Monterey "abruptly changed course" and did no more than offer "conclusory reasons" for its action, *Del Monte Dunes I*, at 1508, an action that "forced Del Monte to bear the burden of creating open space for the public to enjoy." *Del Monte Dunes II*, at 1434.

The Court of Appeals (and the District Court) did nothing more than apply 76 years of this Court's regulatory takings law and some common sense to the circumstances of this case.

II. THE COURT OF APPEALS PROPERLY APPLIED THIS COURT'S REGULATORY TAKING TESTS TO THE FACTS BY DISCUSSING *DOLAN'S* "ROUGH PROPORTIONALITY" STANDARD, A SUBSET OF THE *NOLLAN* "SUBSTANTIAL ADVANCEMENT" TEST, IN A JUDGMENT NOV CONTEXT AFTER THE CITY HAD FAILED THE *NOLLAN* TEST.

The city's *Dolan* argument is a red herring on several levels, most importantly because the city never passed the threshold substantial advancement test of *Penn Central*, *Agins* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In inverse condemnation law, there are "regulatory" takings and "physical" takings. *Lucas*, 505 U.S. at 1028 n.15; *Yee*, 503 U.S. at 522; *San Diego Gas & Electric*, 450 U.S. at 651-53 (Brennan, J., dissenting). *See* Steven J. Eagle, *Regulatory Takings* § 7-4(c), at 251 (1996). First and

foremost, *Del Monte Dunes* is a regulatory taking case. So were *Penn Central* and *Agins*, cases in which, as in *Del Monte Dunes*, the property owners claimed that *denial* of use had triggered a taking. This Court's two-pronged regulatory takings test -- that a taking occurs where "the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land," *Agins*, 447 U.S. at 260 -- was first articulated by this Court in *Penn Central*, 438 U.S. at 127,138.[5]

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[5] In a remarkable argument, the United States, eighteen years after *Agins*, now contends that the takings test enunciated there is just "dictum" and therefore should be renounced. Br. for United States as Amicus Curiae at 21 (No. 97-1235). But the Court in *Agins* concluded that "the zoning ordinance on its face does not take the appellants' property," 447 U.S. at 259, stated the two-prong takings test, *id.* at 260, then held that "[i]n this case, the zoning ordinances substantially advance legitimate governmental goals." *Id.* at 261. In fact, after so holding, the Court never then addressed the alternative, economically viable use prong because of its holding on the "substantial advancement" prong. Additionally, the Court later held in *Nollan* that because there was no substantial advancement of a legitimate state interest in that case, a taking had occurred. The new-found U.S. assertion that the two-prong takings test was not a holding in *Agins* is explicitly contradicted by this Court in *Keystone*, 480 U.S. at 485.

Second, nowhere in *Agins* or *Penn Central* or *Nollan* did the Court hold that the substantial advancement test required a land dedication component. To the contrary, in *Ehrlich v. City of Culver City*, which concerned development fees, this Court issued a writ for certiorari, vacated judgment and then remanded the case to the California Court of Appeal for further consideration in light of *Dolan*. 512 U.S. 1231 (1994). Ultimately, the California Supreme Court agreed with this Court. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996).

Finally, it must be noted that the United States did not dispute the *Penn Central/Agins* "no substantial advancement of a legitimate state interest" test in *Williamson County*, which, like *Del Monte Dunes*, also concerned a § 1983 jury trial. After arguing that the taking issue was not ripe, the U.S. argued alternatively that no taking had occurred because the zoning and subdivision regulations as applied to the subject property "clearly advanced legitimate state interests." Br. for United States as Amicus Curiae at 18 (No. 84-4). The U.S. then moved on to argue satisfaction of *Agins*' "economic use" test. *Id.* at 22. Nor did the U.S. dispute the two-prong test in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), where the government argued (unsuccessfully) that the Fifth Amendment did not require just compensation as the remedy for regulatory takings. Br. for United States as Amicus Curiae (No. 85-1199). In

There, despite a development denial, the Court found no taking because the existing building on the site (Grand Central Terminal) had not been interfered with "in any way" and because the property owner had received "valuable" transferable development rights from the city. *Id.* at 136, 137.

The land use taking test was then given constitutional meaning as to remedy by *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (land use regulatory takings are compensable, including for temporary periods of time). The test's "economic use" prong was later clarified by *Lucas* (denial of all use is a categorical taking; anything less requires a weighing of the three

Nollan, the U.S., without disputing it, recited the two-prong test, Br. for United States as Amicus Curiae at 18 n.14 (No. 86-133), and argued favorably in its behalf. *Id.* at 20-21. Nor did the U.S. dispute the test and call it dictum in its *Dolan* arguments. Br. for United States as Amicus Curiae (No. 93-518).

This Court, by contrast, has been clear and consistent. In *Agins*, it held no taking occurred because there was a substantial advancement of legitimate state interests. In *Nollan*, it held a taking did occur because there was no substantial advancement of legitimate state interests. In *Keystone*, it stated that the two-prong takings test is a holding. Win a case, lose a case, but law is law, or should be.

factors enunciated in *Penn Central*: economic impact on the claimant, extent to which the regulation interfered with distinct investment-backed expectations, and character of the governmental action, 438 U.S. at 124).

Meanwhile, the "substantial advancement" prong of the takings test was clarified by *Nollan* (1987) and by *Dolan* (1994). Taken together, these cases require a close fit, or nexus, between regulatory means and ends. Importantly, if the government does not pass the *Nollan* substantial advancement test, the *Dolan* rough proportionality inquiry is analytically superfluous.

In short, the *Penn Central/Agins* test, repeatedly used by this Court in a variety of settings (*see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone*, 480 U.S. at 485; *Nollan*, 483 U.S. at 834; *Lucas*, 505 U.S. at 1016; *Dolan*, 512 U.S. at 385; *see also San-Diego Gas & Electric*, 450 U.S. at 647, 648 (Brennan, J., dissenting)), is grounded in "regulatory taking" cases, of which *Dolan* is one, involving denials as well as conditional approvals. As this Court noted in *Yee*, *Nollan's* nexus requirement is a regulatory taking concept. 503 U.S. at 530, 534.

The City of Monterey's attempt to distinguish development "exactions" from "denials" creates a distinction without a difference in the actual world of land development application processing. Sometimes applications are denied; sometimes they are approved with conditions; sometimes they are denied and later approved with conditions. And sometimes a citizen is

strung along for years on the exaction/denial continuum. That is exactly what happened here. For purposes of the Fifth Amendment, *Del Monte Dunes*, like every land use taking case cited above from *Penn Central* (1978) to *Suitum* (1997), concerns alleged (and here, proven) use of the police power to transform a private property interest into public use without just compensation.[6] That is the constitutional core of all of the above-cited cases, including the Court of Appeals' opinion in *Del Monte Dunes II*. The court below properly applied this Court's regulatory taking tests to uphold this Fifth Amendment principle.

Dolan reinforces the fact that *Nollan's* nexus requirement derives from *Penn Central*, a case, like *Del Monte Dunes*, concerning the denial of a development application. 512 U.S. at 388. In a thoughtful article, Professor Laitos elegantly ties together this Court's takings cases from *Armstrong* (1960) to *Dolan* (1994), explaining how John Rawls' philosophy of "justice as fairness" reverberates in the Court's application of the

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[6] As the court below explained, the evidence established "that the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." *Del Monte Dunes II*, at 1433. In short, the use "conditions" required by Monterey were the functional equivalent of an "exaction" of the property, which the city then formalized with its "denial" of the fifth application.

Takings Clause. Jan G. Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997); *see also* Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 59-69 (1983) (cited in *Williamson County*, 473 U.S. at 199 n.17). Laitos recognizes *Del Monte Dunes II* as an example of the *Armstrong*-to-*Dolan* principle of limiting government's ability to require a few to bear the burdens for the many. Jan G. Laitos at 363 n.25; 379 n.115. He writes, "[c]rucial to *Dolan's* test is 'impact' -- the Court must expect [to] find that the planned property use will cause a societal problem that the government action intends to alleviate. Absent causation, as in *Dolan*, a regulation violates *Armstrong's* notion of fairness and Rawlsian requirements of equality." *Id.* at 370-71. *See also* Leigh Raymond, Comment, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 Ecology L.Q. 577 (1996).

Several lower courts have recognized the proper role of *Dolan* in this Court's regulatory takings jurisprudence. For example, *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996), concerned a scenario where a development application was *denied* by the city, the landowner filed suit for damages, the city then reversed its position and approved the application but on condition that certain fees be paid by the owner to the city, and the owner then amended his complaint to allege that the fees amounted to an unconstitutional taking. The state supreme court held that one of the development fees violated *Dolan*

after first finding that the fee met the *Nollan* test. Similarly, in *Clark v. City of Albany*, 904 P.2d 185 (Or. App. 1995), *rev. denied*, 912 P.2d 375 (Or. 1996), the state court found that a street improvement required of a developer violated *Dolan's* "rough proportionality" standard while another requirement did not. *See also Northern Illinois Home Builders Ass'n v. County of DuPage*, 649 N.E. 2d 384 (Ill. 1995). In *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994), a developer's site plan was *denied* by the county unless the developer would subsequently agree to build a storm water drainage system for the entire watershed in which the subject property sat. Not until the developer built the system for the entire watershed did the county then approve the site plan for the single property. The developer sued, and the Court of Appeals, citing *Dolan*, agreed that "from our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area." *Id.* at 1275.

The City of Monterey tries to draw a constitutional distinction between a development "denial" and "exaction" and then contends that *Del Monte Dunes II* fatally misapplied *Dolan's* "rough proportionality" standard. But as the above sampling of cases shows, as do the facts of *Del Monte Dunes* itself, "denials" and "exactions," which are cut from the same regulatory cloth by localities acting in the development process, are sometimes used interchangeably to leverage the police power in order to accomplish ends that go

beyond the constitutional limit.[7]

It should not be the case -- and under this Court's precedents it is not -- that government can deny an application and defeat the Fifth Amendment by proclaiming pretextual rationales that relate neither in nature nor extent to the impacts of the proposed use. Of course, where the proffered reasons for a denial bear no substantial advancement of a legitimate state interest, the

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[7] As for the city's argument that *Dolan* cannot be applied to a development denial, it must be noted that the facts of *Del Monte Dunes* belie that position. After five applications, the city refused to permit use of the property even though conditions previously specified by the city had been substantially met by the owner. *Del Monte Dunes I*, at 1506. In addition to demonstrating the illegitimacy of the city's denial (the *Nollan* test), the denial was not roughly proportional to the impacts of the housing development because the concessions made by the landowner met the earlier stated concerns of the city and properly mitigated the project's impacts. Of course, the fact that the city would have continued to leverage ever more concessions (or exactions) beyond the five applications should not stand in the way of finding that the concessions the city sought to expand were not roughly proportional to the shifting reasons given by the city for denying the application. Both sides of the equation are present here; the ratio between the conditions and the project's impacts is so out of balance that even rough proportionality would not be satisfied.

question of proportionality is not critical since the *Dolan* rough proportionality standard is only relevant if the *Nollan* substantial advancement test has been met by the government.

Here, as the Court of Appeals made clear, *the City of Monterey never got past the "substantial advancement" prong of the takings test* laid down by *Penn Central* and *Agins* and explicated in *Nollan*. The court began by observing that "[t]o prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Nollan v. California Coastal Comm'n* [cite]." *Del Monte Dunes II*, at 1428. The court then found that "substantial evidence" in the record supported a finding that each prong of the regulatory takings test had been violated, and the court repeatedly emphasized that the jury had considered evidence on the substantial advancement "issue" or "theory." *Id.* at 1428-30. Indeed, the city did not object to the jury instruction on the *Nollan* issue. *Id.* at 1429.

The Court of Appeals' main treatment of the *Dolan* rough proportionality standard was triggered not because of any live issue in the case (the city had already failed the threshold test under *Nollan*) but simply to reinforce the meritlessness of the city's post-trial motion for a judgment notwithstanding the verdict. *Id.* at 1430-32. In that context, the court merely bent over backwards to give the city the benefit of doubt as it reviewed all the trial evidence:

> *Even if* the City had a legitimate interest in denying Del Monte's [fifth] development application, its action must be "roughly proportional" to furthering that interest . . . . For the purposes of reviewing the district court's denial of the City's motion for judgment notwithstanding the verdict, *we assume* that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate.

Id. at 1430 (emphases added).

In an earlier inverse condemnation case heard by this Court, also one with a jury trial, it was asked, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).[8] *First English* and *Nollan*, *Lucas* and *Dolan* answered that question as the progeny of *Pennsylvania Coal* and *Armstrong*. The Court of Appeals did not abuse those decisions nor did it forget that the Takings Clause is a part of the Bill of Rights.

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[8] Yet, the City of Monterey now asks this Court to give "due regard to the limited role of the Constitution in local land use decision-making." Br. for Petitioner at 27 (No. 97-1235).

CONCLUSION

For the above reasons, and because citizens with rights in property should not be singled out and denied absolutely the opportunity to put their case to a jury (a jury, after all, of local taxpayers), the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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